

The Energy Facilities Siting Board's Hydropower Siting Responsibilities

Background

The Federal Energy Regulatory Commission (“FERC”) has the primary responsibility for permitting new, restored or revised hydropower facilities. By contrast, the EFSB’s role is one of facilitating the review of hydro facilities by state permitting and licensing authorities. The EFSB was first delegated with the responsibility for “coordinating the permitting and licensing of hydropower generating facilities by simplifying requirements for permits and licenses” in 1979 with the addition of 69H1/2¹ to Chapter 164 of the General Laws of the Commonwealth. Other than changes to the title of the EFSB², 69H1/2 has been unchanged for close to 32 years. The regulations implementing the law were promulgated in June of 1981 and are found in 980 CMR 11.00. Importantly, participation in the EFSB facilitation program by a hydro project developer is voluntary.³ The regulations specify that the EFSB, in consultation with other state permitting and licensing agencies, shall:

- Compile a hydropower preliminary notification form (HPNF) that solicits from hydropower project developers all the information that state agencies need to complete their review of a hydro project. The underlying legislation dictates that as far as possible the HPNF should reference information that is required on the Federal Energy Regulatory Commission (FERC) application to simplify the form’s completion and reduce the burden on applicants.
- Review draft submissions of the HPNF and rule on their adequacy.
- Convene a pre-licensing conference of the developer, representatives of the appropriate state and federal permitting and licensing agencies, the electric utility in whose territory the proposed facility is located, providers of financial assistance and any interested parties. (Regulations allow the EFSB to waive the pre-licensing conference in some circumstances).
- Set time deadlines for agency decisions once all information has been supplied.
- Serve, if requested by the hydropower developer or any agency, in the role of mediator in resolving disputes.
- Serve as an appeals board if a developer believes he has been aggrieved by an action or failure to act by an agency.

Process

As directed in the legislation, EFSB, in consultation with relevant state permitting and licensing agencies, designed a HPNF. The regulations state that a developer of a hydropower facility within Massachusetts should file a draft of the HPNF with the EFSB within sixty days following filing for a license or exemption with FERC. When an Environmental Notification Form (ENF)

¹ A copy of Chapter 164, Section 69H1/2 is available on the Massachusetts Department of Public Utilities’s website at <http://www.mass.gov/eea/energy-utilities-clean-tech>

² From Energy Facility Siting Council to Energy Facilities Siting Board in 1992.

³ 980 CMR 11.00 states that a developer “should” follow the procedures described in 980 R 11.00. If a developer does not follow the procedures and process described in that statute, they forego their right to the appeals provisions (980 CMR 11.05).

is required, developers should append the draft HPNF to the ENF. From this point in the process the steps and timing in general include:

- **EFSB Review** - EFSB will review the draft HPNF or HPNF supplement to an ENF, and, within ten days of its receipt, issue a written determination to the developer as to whether the draft HPNF is substantially complete.⁴
- **Developer Distribution of HPNF or HPNF/ENF** - Once the EFSB has issued a determination that the HPNF or HPNF/ENF is complete, the developer must then file the HPNF or the HPNF/ENF with all state permitting and licensing agencies that will be required to act on the project.⁵ According to law the HPNF/ENF will serve as the first agency application for purposes of G.L. c. 30, § 62A (MEPA). This developer filing with State agencies is required to occur no more than 60 days after the official notice of filing at FERC for a license or exemption (EFSB may grant an extension).
- **Pre-Licensing Conference** -the EFSB, in consultation with the MEPA unit, shall schedule a pre-licensing conference at or near the project site⁶. This conference shall be held with 40 days after the EFSB's receipt of the HPNF or 30 days after the publication of the HPNF/ENF in the "Environmental Monitor." EFSB will notify, or direct the developer to notify, all relevant parties (state and federal regulatory agencies, providers of financial assistance, the utility within whose service territory the project will be located and other interested parties or persons) of the time and place of the pre-licensing. For projects subject to MEPA, this conference should, if feasible coincide with the MEPA "scoping session." At this pre-licensing meeting the permitting and licensing agencies, in consultation with the developer, will determine what additional information, data or studies may be required for compliance. The Pre-Licensing Conference can also be used for the purpose of "resolving any disputes between the developer and the permitting and licensing agencies concerning the form, content, level of detail and schedules of such requirements".

⁴ The EFSB may reject an HPNF which is patently deficient or it may accept it but recommend to the project proponent that supplementary information be included in order to improve and expedite the review by the permitting and licensing agencies.

⁵ At the option of the developer, the filing of the HPNF may serve in lieu of a Notice of Intent for the local Conservation Commission's review process.

⁶ The regulations (but not the legislation) state that the Pre-Licensing Conference should include a site tour with the developer. As a practical matter, this stipulation has led to the practice of holding the Pre-Licensing Conference on the site of the proposed project

- **EFSB Coordination of Agency Responses** - Within 15 days of the Pre-Licensing Conference, all state and local agencies are required to file with the EFSB a written statement of any additional agency requirements (e.g. applicable forms, additional data). EFSB is expected to facilitate the timely filing of required information and the prompt action by agencies on any licenses or permits. Once all required information has been received by any licensing or permitting agency, the EFSB shall set a deadline—not to exceed 90 days-- by which the agency must act on the license or permit. (G.L. c. 30, § 62B). Throughout the process of information gathering and agency deliberation, the EFSB, upon request from a developer, is intended to make reasonable efforts to resolve disputes.
- **EFSB Hears Appeals** - the EFSB serves as a forum for any final administrative appeal for any party aggrieved by a state or local agency's licensing action, or failure to act in a timely manner.